

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

EL PASO COUNTY, TEXAS, and) No. EP-19-CV-66-DB
)
 BORDER NETWORK FOR HUMAN RIGHTS)
)
 Plaintiffs,)
)
 vs.) El Paso, Texas
)
 DONALD J. TRUMP, in his official)
 capacity as President of the)
 United States of America,)
 et. al.,)
)
 Defendants.) August 29, 2019

ORAL ARGUMENT

A P P E A R A N C E S:

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1 THE COURT: The clerk will call the case.

2 THE CLERK: EP-19-Civil-66, El Paso County, Texas,
3 et al., versus Donald J. Trump, et al.

4 THE COURT: Announcements first, Counsel.
5 Announcements first.

6 MR. GERSON: Yes, Your Honor.

7 THE COURT: Before you get started.

8 MR. GERSON: Yes, sir.

9 THE COURT: You've been explained the procedure, okay?

10 MR. GERSON: Yes, sir.

11 THE COURT: Standing issue for one hour. First the
12 Plaintiff, and then the Defense. We'll take a short break,
13 come back on the merits. First the Defense, and then the
14 Plaintiff.

15 MR. GERSON: So, we understand. Thank you,
16 Your Honor.

17 THE COURT: Go ahead.

18 MR. GERSON: May it please the Court.

19 I'm Stuart Gerson, along with my colleague, Ephraim
20 McDowell. We represent the County of El Paso and the Border
21 Network for Human Rights.

22 The President's so-called Emergency Proclamation and
23 related administrative actions as to the re-purposing of
24 congressionally-appropriated funds is unlawful and
25 unconstitutional for a variety of reasons that Mr. McDowell

1 will discuss in his hour.

2 First, however, I shall address why the Plaintiffs,
3 the County of El Paso and the Border Network, have standing to
4 raise these claims.

5 The Government has, among other things, suggested that
6 the President's statements are no more than mere words, and
7 that the Defendants' allegations of injury -- or that the
8 Plaintiffs' allegations of injury -- are too speculative and
9 contingent to admit as standing, and we assume ripeness as
10 well.

11 Especially in this community, one can't avoid the
12 conclusion that words have both power and effect, and that such
13 an effect can create cognizable injury-in-fact. That's the
14 case here.

15 And just two months ago, almost to the day, the
16 Supreme Court exploded the Government's principle point
17 concerning standing. That was in the case of *Department of*
Commerce against New York, the well-publicized Census Act case
18 and the issue of whether a citizenship question should be
19 introduced.

21 Noting that the respondents in that case asserted that
22 a number of injuries which turn, quote, on their expectation,
23 unquote, of injury, the Supreme Court held that they stated a
24 justiciable case that admitted a relief.

25 Quoting *Babbitt against United Farm Workers*, the Court

1 reiterated, quote, that although a plaintiff must demonstrate a
2 realistic danger of sustaining a direct injury as a result of a
3 statute's operation or enforcement, a plaintiff does not have
4 to wait until the consummation of threatened injury to obtain
5 preventive relief. Thus, actual injury can turn on
6 expectation.

7 In this case, to start with, it's the announcement of
8 a policy, not its ultimate execution, that's created this
9 expectation. But that's not the end of it. Because here, both
10 the County and the Border Network have injury-in-fact in the
11 present, not just a mere expectation.

12 The words have had a great deal of effect on the
13 community. But along with the words and the actions that have
14 supported them, both the County of El Paso and the Border
15 Network for Human Rights have had to undertake activities,
16 spend their time and resources, their human resources, their
17 economic capital, to do things that they would not have had to
18 do but for the Proclamation and for the administrative
19 activities that have been undertaken so far and are further
20 threatened.

21 Both of our clients, and the public they serve and
22 need to address, believe that the administration intends to do
23 what it says it intends to do unless it's checked by this
24 Court. And they've experienced both cognizable and costly
25 reputational and economic injury because of what we submit is

1 this unlawful so-called emergency declaration. That is,
2 activities, as I said, that would not have been undertaken
3 otherwise.

4 Injury that is concrete, particularized, and actual or
5 imminent, fairly traceable to the Defendants' challenged
6 behavior and likely to be redressed by a favorable Court
7 ruling, as the Supreme Court held in *Davis against Federal*
8 *Election Commission*, are the hallmarks of Article III standing.

9 And I -- as I shall list, I respectfully submit that
10 both the County and the Border Network have an unfortunate but
11 true list of things that they have experienced that are both
12 reputational and economic in nature besides the apprehension
13 that has compelled action because of the President's
14 unfortunate words in conjunction with the Proclamation.

15 As far as the County is concerned, the President's
16 Proclamation, his Rose Garden reference in conjunction with it
17 specifically to El Paso, his visit to El Paso, and statements
18 related to the Proclamation have, as has been explained in the
19 Samaniego and Keller declarations, generated both substantial
20 community fear and the inhibition of business.

21 Especially because the El Paso Sector Project
22 Number 1 -- which is in an adjacent county, it's not in this
23 county -- is approved, the construction blight that this county
24 has predicted has started to occur.

25 And just a few days ago, the Government told us that

1 additional monies have been released and they're not to go to
2 El Paso, but it puts the pressure on El Paso. It affects the
3 Border Network directly in a way that I will -- that I will
4 show in a few minutes.

5 But coupled with statements that the President has
6 made just in the last couple of days, of which I submit to
7 Your Honor, respectfully you can take judicial notice of, he
8 intends, unless checked, to have his border wall completed by
9 the time of the election. That means, unless checked, it's
10 coming here, and that pressure has already started.

11 But in addition, the Proclamation from the very
12 beginning has painted El Paso as unsafe and undesirable, and
13 it's had an effect.

14 The county anticipates, ultimately, the tourist
15 business might be affected. But in the short run, what it's
16 concern is is on business opportunity. And as the affidavits
17 make clear, people who might otherwise have come here and
18 invest here and improve the economy beyond the status quo are
19 now pulling back. There's less share of the market.

20 And ultimately -- not today, but ultimately -- tax
21 revenues will be affected. But in the short run, additional
22 promotional activities have to be undertaken and resources
23 applied that should have been applied elsewhere that wouldn't
24 have to be applied as to this but for the Proclamation and the
25 activities at issue.

1 So there's a shortage of investor money. Paragraph 11
2 of the Samaniego deposition shows that. Judge Samaniego also
3 details delays at the port of entry entering the products --
4 the importation of products into El Paso as a result of the
5 Proclamation.

6 Fort Bliss, which has been styled as the lifeblood of
7 this community, also will suffer by having funds intended for
8 it redirected. And that will also injure the community, both
9 directly and indirectly. Less spending and less jobs due to a
10 lack of construction at Fort Bliss, that diversion away from
11 programs that Congress intended to be used for construction
12 won't be.

13 In addition, the diminution and the climate here has,
14 according to the Keller affidavit, Paragraph 11, hindered
15 efforts to attract applicants to local Government posts.

16 County economic development has been inhibited, and
17 the County is being forced to spend time and divert resources
18 to deal with an issue caused by the Proclamation that it would
19 not have experienced but for it. Injury is direct and it is
20 clearly redressable by Your Honor.

21 The Border Network for Human Rights has a core
22 mission, and that is to organize border communities and
23 advocate for positive changes in policies and practice that
24 affect the lives of the immigrant community. It is, under
25 normal circumstances, a policy-oriented organization.

1 Because the action of the Defendants have plainly
2 targeted border communities and the people who live near it,
3 they have preceptively impaired the Border Network's ability to
4 pursue its normal mission; and, instead, having turned its
5 attention to the Proclamation and its effects on local
6 condition -- local conditions and morale, not the broader
7 interest of immigration policy.

8 As a result of all of this -- and that's, by the way,
9 consistent with the *Havens Realty* case view of standing.

10 But in conjunction with that broader statement that
11 I've made, the Border Network has now had to hold
12 Proclamation-related weekend events. The Garcia affidavit,
13 Paragraph 14, describes that. Those were never needed before,
14 and they've been -- they've had to come at the expense of other
15 things that the Border Network was chartered to do.

16 As I've mentioned earlier, the Border Network's range
17 of activities has crossed the border, out of this county and
18 into the area where construction actually has started, and is
19 directly affected by the fact of that construction.

20 The Border Network has needed to hire an additional
21 policy consultant to deal with these issues, hiring a human
22 being to work for them, that they would not have had to hire
23 but for the Proclamation. That's an economic injury.

24 Unfortunately, the climate that has been created by
25 the Proclamation, that is something much stronger than mere

1 words, have heightened racial and ethnic tensions in the
2 community. I don't have to go into detail about that, but I
3 can say that the Border Network is now, instead of dealing with
4 the policy questions that it was established to deal with, has
5 to do things like helping people get to school and their jobs
6 and counsel them in ways that it never had to do before. And
7 not with regard to immigration policy, but with the day-to-day
8 dislocation that the Proclamation has occasioned.

9 The Border Network has had to give up a program called
10 "Hugs Not Walls," which was a major initiative to build trust
11 between the immigrant community and law enforcement. Tensions
12 there have increased, a material effect on the work of the
13 Border Network.

14 And the quality of life of the constituents and
15 members of the Border Network have been negatively affected
16 because of public safety issues, traffic, impedance at the port
17 of entry, pollution, and the need to deal with this
18 apprehension by counseling people to attend their jobs,
19 schools, and health facilities in the wake of what has been
20 styled erroneously, but in conjunction with the Proclamation,
21 as a criminal invasion of this community.

22 Members' movement at and across the border also has
23 been negatively affected, as the Garcia affidavit,
24 Paragraph 35, describes.

25 In short, the diversion of resources and the

1 undertaking of activities that have been occasioned by the
2 Proclamation have demonstrated both that the County has
3 experienced reputational injury and economic injury.

4 The Border Network has had to deal with issues that
5 have essentially forced it to reprogram what it was set up to
6 do.

7 The Government offers no counter affidavits, does not
8 really challenge any of our declarations as a matter of fact.
9 And contrary to the argument that it does make, we note the
10 cases in our brief, such as *OCA Greater Houston, Association of*
11 *Community Organizations for Reform Now against Fowler*, and
12 overall what the Supreme Court had to say in *Department of*
13 *Commerce and The City of New York*, as demonstrating that the
14 two Plaintiffs here have Article III standing to bring these
15 cases and to obtain the relief that they seek.

16 If the Court has no questions, I have nothing further
17 to say except that the Court should grant the relief that we
18 seek, and I will defer the next portion to Mr. McDowell to talk
19 about the merits.

20 Thank you, Your Honor, for the ability to practice
21 here. I appreciate the admission.

22 MR. BURNHAM: Good morning, Your Honor.

23 THE COURT: Good morning.

24 MR. BURNHAM: James Burnham on behalf of the
25 United States.

1 With me I have Michael Gerardi and Andrew Warden, also
2 from the Justice Department.

3 As Your Honor knows, and as Mr. Gerson just went
4 through, there's four elements -- I'm sorry -- three elements
5 the Plaintiffs need to establish in order to show standing.

6 They have to show an injury-in-fact that is concrete
7 and particularized, actual and imminent, and not conjectural or
8 hypothetical.

9 They have to show that that injury is fairly traceable
10 to the thing that they want to challenge.

11 And they have to show that a judicial ruling it is
12 likely, as opposed to merely speculative, that a judicial
13 ruling will actually redress the injury that they claim to have
14 suffered.

15 So I'll start with the County. El Paso County lacks
16 standing to challenge either the Proclamation or
17 284 construction. I think it's important to establish at the
18 outset -- and Mr. Gerson himself said this, too, so I don't
19 think anyone disputes this -- there's no construction, no
20 border barriers currently authorized or currently being built
21 in El Paso County. So there's no construction in the county
22 that the county -- that's affecting the county or the county's
23 residents in El Paso.

24 The closest project, the one that's in closest
25 proximity, is in New Mexico, in Luna County and Doña Ana

1 County, New Mexico. And that's all explained in the Rapuano
2 Declaration, which is Exhibit A to our Motion for Summary
3 Judgment.

4 So because there's no construction within the county,
5 the County advances two other bases for standing, what I'll
6 call reputational harm and pecuniary injury. But both of them
7 fail on each prong of the standing analysis.

8 They aren't cognizable injury. They're not traceable
9 to the Proclamation, as opposed to other things, and that
10 injury is not redressable by a Court order related to the
11 Proclamation, again, as opposed to other things.

12 Each is based -- each is based on allegations of
13 indirect harm from the sort of speculative chain of events that
14 the Supreme Court has consistently said is not enough for
15 standing.

16 So first, on reputational harm.

17 It's well-established, in the Fifth Circuit and
18 elsewhere, that disagreement with a Government message does not
19 create standing to challenge it.

20 So I'll just give Your Honor one citation. The Fifth
21 Circuit's decision in *Barber v. Bryant*, which is at 860 F.3d
22 345, a 2017 decision, where the Fifth Circuit explained that
23 standing -- quote, standing is not available to just any
24 resident of a jurisdiction to challenge a Government message
25 without a corresponding action about a particular belief.

1 The Proclamation does not mention the County. It does
2 not target the County. Indeed, the County, in its First
3 Amended Complaint at Paragraph 102, admits that the President
4 called El Paso one of America's -- and this is a quote -- one
5 of America's safest cities, end quote, in the State of the
6 Union just weeks before the Proclamation.

7 The County's concerns about the independent actions of
8 third parties, people who might not apply for jobs, tourists
9 who might not visit, are just speculative harms. And they're
10 the same sorts of speculative harms that the Supreme Court said
11 was not enough in its decision in *Clapper v. Amnesty*
12 *International*, which is at 568 U.S. 398. That's a 2013
13 decision.

14 The County's authorities, most of which predate
15 *Clapper* -- I think, actually, possibly all of which predate
16 *Clapper*, but certainly most -- are all cases where the policy
17 was self-executing and had a direct, actual, clear effect on
18 the plaintiff. That's just not the case here with the
19 Proclamation.

20 Turning to traceability -- and I apologize. If they
21 post-date *Clapper*, please correct me. I don't mean to misstate
22 it.

23 On -- turning to traceability, the County similarly
24 cannot show that the Proclamation itself is the cause of
25 whatever reputational harm it alleges that it has suffered.

1 The debate about the border has been going on for
2 decades. It's a -- you know, a hot topic in our political
3 discourse that's commented on by many people without reference
4 to the Proclamation and outside the Proclamation, and so the
5 County just can't show that the harm that they put forth is
6 traceable to the Proclamation itself, the actual legal document
7 that they want to challenge, as opposed to these other things.

8 For that same reason, the County can't show that a
9 decision finding that the Proclamation was somehow unlawful,
10 that it exceeded the President's authority, for example under
11 the National Emergencies Act, would redress the reputational
12 harm that they purport to have suffered.

13 Stopping the Government from implementing the
14 Proclamation such as, for example, the Secretary of Defense
15 making a decision to build barriers pursuant to it and then
16 implementing that decision, simply won't have any effect. It
17 will not redress the County's asserted injury to its
18 reputation.

19 Turning to the pecuniary injuries.

20 Neither Ms. Keller nor Judge Samaniego present
21 evidence of concrete, imminent injury to the County's pecuniary
22 interests as a result of the Proclamation.

23 One thing I'd like to just clear up real quickly.

24 Mr. Gerson made a reference to Fort Bliss losing money
25 as a result of the Proclamation, but that is just speculation

1 at this point. There's no evidence in the record of any
2 decision that has been made right now that will divert any
3 money from Fort Bliss.

4 Now, that may -- that may change when the Secretary of
5 Defense makes a 2808 decision, which I'll get to in more detail
6 in a moment. But at this point no decision has been made, and
7 so it's totally speculative whether Fort Bliss would lose any
8 money.

9 Turning to what is -- based on the current record.

10 Turning to what is in the record, fear about
11 third-party's actions, such as tourism, are not the sort of,
12 quote, certainly impending injury that Clapper talks about.

13 And there's no evidence that replacing vehicle
14 barriers, because in the place in New Mexico, where they're
15 building, there's already vehicle barriers with taller and
16 differently-configured pedestrian barriers, will affect the
17 County at all, much less, as Ms. Keller says in her
18 declaration, quote, disrupt the County's regional economy.

19 And that's at Paragraph 13 of her declaration.

20 There's just no evidence to show that in a concrete,
21 real way that the replacement of barriers would actually have
22 the effect that Ms. Keller is worried about.

23 Similarly again, on traceability, there's just nothing
24 in the record to show that enjoining the Proclamation or
25 enjoining the 284 construction in New Mexico would actually --

1 I'm sorry -- that those harms that they're complaining about
2 are traceable to those things, or that a Court order enjoining
3 those things would redress the pecuniary harms that the
4 County's declarants are concerned about.

5 Turning to the other plaintiff -- so for all those
6 reasons, I think it's clear that El Paso County does not have
7 standing to bring the claims that they have brought, and that
8 summary judgment for the Government is appropriate just on that
9 basis alone, without getting into any of the other issues
10 presented.

11 Turning to the Border Network for Human Rights, they
12 also do not have standing to challenge either the Proclamation
13 or the 284 construction.

14 The Border Network has advanced standing on one basis,
15 which is organizational standing. So there's two ways that a
16 group like the Border Network could have standing.

17 One is that they have standing as an entity.

18 The other is that they have what's called
19 associational standing, which means they have members who
20 are -- who themselves have standing, and they're bringing suit
21 on their behalf.

22 But the Border Network has not attempted to establish
23 standing that way, so they don't have individual members who
24 they file declarations for and all of that, who are somehow
25 directly affected. So their only theories of standing are

1 based on their status as an organization.

2 Now as I understand it, they've advanced four possible
3 injuries for standing, and I'll go through each of them, but
4 none of them are sufficient.

5 Injury. None of them are redressable by an order of
6 the Court that they seek, and none of them are traceable to the
7 Proclamation.

8 So the first one, and I think the most substantial of
9 them, though I don't think it makes it over the line, is
10 diversion of resources.

11 So the Border Network claims that it's had to -- and
12 I'm quoting from their Amended Complaint, quote, divert
13 organizational resources from its normal programming to respond
14 to the President's Proclamation, end quote, including
15 counseling, end quote, recruiting, and training attorneys to
16 handle the increase in incoming complaints, end quote, hiring a
17 policy consultant, sending a delegation to Washington, D.C.,
18 and working longer hours.

19 And that's from the First Amended Complaint at
20 Paragraphs 113 to -15.

21 Now, that's just not enough to establish standing
22 under the Supreme Court's decision in *Havens Realty Corp. v.*
23 *Coleman*, which is discussed throughout the briefs, but is at
24 455 U.S. 363. And I'll just walk through what that case is
25 about, because I think it illustrates why the Border Network

1 doesn't have standing here.

2 The Plaintiff in that case was a, quote, housing
3 counseling service, end quote, whose organizational mission
4 included the investigation and referral of complaints
5 concerning housing discrimination.

6 In that case, the groups -- and if I'm going over my
7 time, please stop me and I'll sit down.

8 In that case, the group sent testers to an apartment
9 complex to determine whether the complex practiced unlawful
10 racial steering, and subsequently sued to challenge the
11 practice that it discovered. It discovered that there was, in
12 the group's view, unlawful racial steering going on at the
13 complex.

14 Now in that unique circumstance, the Supreme Court
15 agreed that, quote, racial steering had, quote, impaired
16 plaintiff's ability to provide counseling and referral services
17 for low- and moderate-income home seekers, end quote,
18 establishing injury-in-fact.

19 That's at 379 of the Court's opinion.

20 So in that case, you had a group that, before the
21 thing that they were suing over happened, was directly engaged
22 in helping people find housing in these housing complexes. And
23 there was a policy that clearly and directly, in a very
24 specific and clear way, interfered with that mission. That is
25 a very direct connection.

1 The Court did not hold in *Havens Realty* that a public
2 interest group's voluntary choice, for example, to spend money
3 or to hire a lobbyist or go to Washington to oppose a policy
4 that the group dislikes, would itself be sufficient to
5 manufacture standing to challenge that policy in federal court.

6 If that were the case, any group that opposed a new
7 policy that the Government issued could simply, by virtue of
8 spending money to oppose the policy, create its own standing to
9 come into federal court and challenge the policy by making the
10 same argument that the Border Network has made here, that the
11 policy forced them to spend the money opposing it; and,
12 thereby, caused them injury.

13 The Fifth Circuit decisions that the Plaintiffs cite
14 confirm as much. They all recognize standing only when a
15 defendant actually inhibits a plaintiff from carrying out its
16 organizational mission either by imposing affirmative barriers
17 or neglecting a positive legal duty vis-à-vis the plaintiff
18 organization.

19 In this case, the group just lacks the close
20 connection these cases require. So if you look at the Garcia
21 declaration, which is the -- I think the only, but certainly
22 the principal declaration for the Border Network, the -- he --
23 Mr. Garcia describes the group's mission as community
24 organizing, education, and advocacy.

25 But the Proclamation imposes no obstacles or

1 constraints on the Border Network's ability to do those things.
2 Those efforts are precisely the same sort of what *Havens Realty*
3 called abstract social interest, end quote. That just is not
4 enough for standing.

5 Another quote that I think illustrates the point comes
6 from *Clapper*, the Supreme Court's most recent, you know, major
7 standing opinion. In that case the Court said, quote,
8 Respondents cannot manufacture standing merely by inflicting
9 harm on themselves based on their fears of hypothetical future
10 harm that is not certainly impending.

11 And that's at page 416 of the Supreme Court's opinion
12 in *Clapper*.

13 Again, that, I think, is what's going on here. The
14 group's post-Proclamation activities are not different in kind
15 from its pre-Proclamation mission. They're just more targeted
16 at the Proclamation because the group is exercising its First
17 Amendment right to oppose the Proclamation which it, of course,
18 has every right to do, but which does not give it standing.

19 If I could also just quickly address the "Hugs Not
20 Walls" program.

21 If you actually look at the Garcia Declaration, I
22 believe they attribute the termination of that program to both
23 their voluntary decision to not do it anymore and also to,
24 quote, the fact that, quote, law enforcement is no longer
25 supportive, end quote.

1 That's from Paragraph 32 of the Garcia Declaration.

2 Whether or not law enforcement is supportive of the
3 program is a separate thing from the President's Proclamation
4 or the 284 construction.

5 And so again you see, you know, the harm is not
6 concrete. But even if it is concrete, it's not traceable.
7 It's not directly linked to the thing that the Plaintiffs want
8 to challenge.

9 Another case that I think is worth -- worth a read,
10 Your Honor, on this point is *NAACP v. City of Kyle*, which is a
11 2010 Fifth Circuit decision that's cited in the briefing.

12 And there the Court said, quote, redirecting resources
13 to litigation and legal counseling in response to actions or
14 inactions of another party is insufficient to impart standing
15 upon the organization.

16 And I think that kind of ties it all together here.
17 Because I think that's what the Border Network is talking about
18 with -- with the diversion of resources. It's just not the
19 kind of thing that creates standing.

20 On the second basis for standing, as I understand it,
21 is what they call stigmatization, that they've been
22 stigmatized. And so the way they put it in the Complaint is
23 the Proclamation, quote, stigmatizes BNHR's community members,
24 end quote, and disrupted the, quote, ongoing campaign to build
25 and maintain trust between community members and law

1 enforcement, end quote.

2 And that's at Paragraph 116 of the Amended Complaint.

3 Again, I think that's the very sort of abstract social
4 interest that *Havens Realty* was talking about. That just isn't
5 something that shows harm for standing, and that also is not
6 something that they can trace directly to the Proclamation or
7 show that an order saying the Proclamation was somehow unlawful
8 would solve. Because, of course, that order would not do
9 anything to stop the debate about the border. The President's
10 statements about the border are separate from the Proclamation
11 or anything else that the Plaintiffs have talked about today.

12 So that one also is just too speculative, not
13 traceable, and not redressable.

14 The third harm, as I understand it, is that the
15 construction of the border barriers in New Mexico, which again
16 is just the replacement of existing vehicle barriers with new
17 pedestrian barriers, will somehow delay border crossings and
18 create pollution and noise.

19 So again, just to be clear, this construction is not
20 happening in El Paso or El Paso County. It's happening over
21 the border in New Mexico. And this is the basis, by the way,
22 that was alleged in the Complaint, but I don't believe
23 Plaintiffs have pressed it in their summary judgment motion, so
24 the Court may not need to address it at all.

25 But at most, it applies only in New Mexico. But even

1 there, these threats lack the imminence and concreteness that
2 Article III standing requires.

3 Current slowdowns today at border crossings cannot
4 possibly be the result of, quote, recently announced, which is
5 what the projects are, construction on federal land in another
6 state outside established ports of entry.

7 All Mr. Garcia claims is that the construction will,
8 quote, threaten to make the problem worse, end quote.

9 That's Paragraph 34, without explaining how it will
10 make the problem worse or showing that it will, in fact, in a
11 specific and concrete way make the problem worse.

12 Past negative experience, which Mr. Garcia talks about
13 in his declaration with construction, simply does not make
14 future harm imminent. And there are no members, for example,
15 of the Border Network who have come and who live in the
16 construction area where the vehicle barriers currently are who
17 have said that it will have some sort of direct effect on them.

18 So this basis, too, just is not sufficiently concrete.
19 It's not traceable. It's not redressable. And it doesn't
20 establish standing.

21 The final basis for standing, as I understand it, is
22 alleged fear in immigrant communities. But ev- -- but even
23 that one, too, is not sufficient injury. Because even if the
24 Border Network is sincere in its belief that it must take
25 action to mitigate fears, or risks arising from fear of future

1 events, *Clapper*, which is another case about possible future
2 events, says that such fears are not sufficient for purposes of
3 Article III standing.

4 And so the Border Network's affirmative efforts to get
5 ahead of the curve and avoid future problems just aren't the
6 kind of thing that manufactures standing. Again, as *Clapper*
7 put it, Respondents cannot manufacture standing merely by
8 inflicting harm on themselves based on their fears of
9 hypothetical future harm.

10 And that's a direct quote from the Supreme Court's
11 opinion.

12 So once again, the harm is not concrete. It's not
13 traceable. It's not redressable.

14 If I can quickly just address the *Department of
Commerce* case from two months ago.

16 In that case, the basis for finding standing there was
17 following the Court's finding -- the District Court's finding
18 that, quote, reinstating a citizenship question will depress
19 the census response rate and lead to an inaccurate population
20 count.

21 That's at page 2565 of the Supreme Court Reporter
22 cite.

23 In that case, there had been a trial in the District
24 Court where extensive testimony was presented including, I
25 believe, although I was not -- did not handle that case -- I

1 believe there was even expert testimony showing that the
2 inclusion of the citizenship question would depress the
3 response rate which would, in turn, have the effect of shifting
4 congressional seats in the apportionment away from places that
5 had people who didn't respond because of the question in places
6 where that was less of an issue.

7 And so what the Supreme Court said -- and this is at
8 slip opinion pages 10 to 11 -- quote, Respondent's theory of
9 standing just does not rest on mere speculation about the
10 decision of third parties. It relies, instead, on the
11 predictable effect of Government action on the decisions of
12 third parties, end quote.

13 And again, the Court should go with what the Supreme
14 Court actually said, rather than my recollection. But my
15 recollection is that there -- I know there was a trial and that
16 there was extensive evidence presented at that trial that
17 showed, in a really specific, tangible, concrete way, why this
18 was going to happen.

19 If you look at the declarations here, they simply
20 assert their belief that these are -- that the Proclamation has
21 caused the harms they complain about without actually showing
22 how the Proclamation -- again, isolated from other things, the
23 President's rhetoric, the public debate, you know, people's
24 impressions of the border -- is causing their harm.

25 If I could turn for just a moment -- and I'm almost

1 done, Your Honor -- to 2808 construction.

2 So there's no challenge -- so let me just back up a
3 step.

4 There are three types of border barrier construction
5 that are sort of happening right now. There's projects that
6 Congress has directly appropriated money to undertake. As I
7 understand it, those are not at issue here at all. And there's
8 a project, for example, the Rio Grande Valley, where Congress
9 appropriated money and that's being done. And I don't -- I
10 don't understand Plaintiffs to have any quarrel with that, at
11 least not yet.

12 Second -- there's a second bucket of projects that the
13 Defense Department is undertaking, using an authority at 10
14 U.S.C. Section 284, following a request from the DHS secretary.
15 That bucket of projects is ongoing right now because of the
16 Supreme Court's stay of a District Court order in
17 San Francisco -- actually, it was Oakland -- that I'll tell you
18 about when we get to the merits.

19 Those projects have nothing to do with the
20 Proclamation.

21 So the project in New Mexico has nothing to do with
22 the Proclamation. The authority to engage in that building
23 project is independent from the Proclamation. It's 10 U.S.C.
24 284. And so whether -- whatever happens with the Proclamation,
25 it would not affect the legality of that project.

1 And that's, as I say, the one where the Supreme Court
2 recently issued a stay, and so construction is -- is ongoing.

3 The third bucket of projects, which is the one that
4 would depend on the Proclamation, is under a different statute,
5 10 U.S.C. 2808. That's a statute that is, you know, unlocked,
6 as it were, by a national emergency declaration. In other
7 words, it depends on the declaration of a national emergency to
8 come into effect.

9 Those projects are not justiciable, not only for the
10 reasons I've already provided, but also because nothing will
11 happen until the Secretary of Defense makes a decision to build
12 something.

13 Now, I need to -- I want to tell the Court, my
14 understanding is that a decision, a 2808 decision, could be
15 soon, could be very, very, very soon.

16 What I would suggest on these projects is that the
17 Court not try to adjudicate this issue in the abstract, but it
18 wait until there is a decision, which as I say could be very --
19 quite soon. And as soon as there is, by the way, we will
20 notify everyone, including the Court, that it's been made.

21 I think it would be better to wait until there
22 actually is a decision to actually try to decide the issue. I
23 think it's also, by the way, legally required, because there's
24 no standing to challenge this decision until it's actually been
25 made. They can't challenge it in the abstract. There's no --

1 there's no harm yet.

2 And as we've talked about, for all the reasons I've
3 given, their challenges to the Proclamation, they just don't
4 have standing to do that.

5 Whether they have standing to challenge an actual
6 implementation of the Proclamation is something that we can't
7 really assess until the implementation has been decided and we
8 know what the facts are; we know where the building is; we
9 know, for example, whether the money will come from Fort Bliss.

10 These are all things that I think the Court would need
11 to analyze to assess whether standing exists after the
12 decision. But right now, when there is no decision, although
13 there could very soon be a decision, I don't think there's just
14 any way for the Court to really figure that out.

15 So on that, I would just suggest that the Court -- the
16 prudent course is to wait until the decision which, not to
17 belabor it, could be very, very soon, and which we will notify
18 the Court of, on that.

19 So for all the reasons I've given, there's no standing
20 to challenge the Proclamation for either of the Plaintiffs.

21 There's no standing to challenge the 284 construction
22 for either of the Plaintiffs.

23 And there's no standing at this time to challenge
24 future 2808 construction for either of the Plaintiffs, though
25 we're happy to provide supplemental briefing. I'm happy to

1 come back, whatever the Court would desire, after the decision
2 is made, to have a discussion, if the Court would like, about
3 whether the Plaintiffs do have standing in light of that
4 decision, though I'm confident they won't.

5 So unless the Court has any further questions, I'm
6 happy to be quiet.

7 THE COURT: I don't have any questions.

8 MR. BURNHAM: Thank you, Your Honor.

9 THE COURT: Let's take a short break and then we'll
10 come back on the merits.

11 We'll be in recess for the next 10 minutes.

12 (Recess taken; open court.)

13 THE COURT: Mr. Burnham?

14 MR. BURNHAM: Hello again, Your Honor.

15 Your Honor, turning to the merits, Plaintiffs have
16 advanced every conceivable argument there is against border
17 barrier construction.

18 Now because they don't have standing, for the reasons
19 I've explained, the Court need not reach the merits.

20 In addition, the Supreme Court of the United States
21 recently stayed an injunction very similar to the one that
22 Plaintiffs seek here, blocking similar border barrier
23 construction, based on theories that are very similar to the
24 Plaintiffs'. I think this Court should defer to that stay and
25 decline to issue a new injunction here.

1 But should the Court reach the merits, it is clear
2 that each of Plaintiffs' claims fail.

3 I'll focus primarily on the Proclamation today, but
4 I'm happy to, of course, answer any questions that Your Honor
5 may have.

6 On the Proclamation, every court -- every court that
7 has considered the issue has uniformly concluded that a
8 presidential declaration of a national emergency is a
9 non-justiciable political question. So that's a lot of cases
10 that have found that.

11 We have a lengthy string of cites in Footnote 9 of our
12 Motion for Summary Judgment. I don't think this Court should
13 deviate from that.

14 Just to give you a few examples, in *Soudovar v. Bush*,
15 which is admittedly an unpublished Fifth Circuit decision, but
16 it's available at 46 Federal Appendix 731, the Fifth Circuit
17 affirmed a District Court decision dismissing a challenge to
18 executive orders imposing national emergency sanctions on Iran
19 as involving a, quote, non-justiciable political question.

20 Since the passage of the National Emergencies Act in
21 1976, there have been nearly 60 national emergencies that have
22 been declared by seven different presidents. And even in the
23 few instances where those declarations were challenged, no
24 court has ever reviewed the merits.

25 The Plaintiffs make some mention in their brief of how

1 many of those were under a different national emergency
2 statute, the International Economic -- I'm probably garbling
3 it. IEEPA is the acronym -- but it's the International
4 Economic [sic] Emergency Powers Act. That's what it stands
5 for.

6 I'm not sure why that would be any different. They're
7 very similar. And in fact, that one has a direct effect on
8 businesses and companies and who they're allowed to do business
9 with.

10 So it's certainly something where the President is
11 having -- or the declaration has a very direct effect on
12 private parties. No court has ever reviewed any of them.

13 The reason why no court has ever reviewed any of these
14 on the merits is because there's no judicially manageable
15 standards to resolve the claim. What the Plaintiffs are asking
16 for is essentially, quote -- and I'm quoting from the Supreme
17 Court's political question case, most recent one, *Zivotofsky v.*
18 *Clinton* -- is, quote, the Court's own unmoored determination of
19 what United States policy should be. In that case, it was --
20 that was a reference to potential policy towards the state of
21 Israel. Here, it's a potential policy at the southern border.

22 In that case, where they did find that it was
23 justiciable, though, there was much more law to apply. Here,
24 of course, there's not. It's a pure policy judgment.

25 The NEA does not define anywhere what a, quote,

1 national emergency, end quote, is, nor does it provide any
2 standards whatsoever to evaluate whether something is a
3 national emergency.

4 Congress did not -- by not defining national
5 emergency, Congress left it to the President to determine when
6 to declare one.

7 The Court would have to invent a standard for
8 declaring a national emergency from whole cloth. And I think
9 Plaintiffs' brief confirms this, because they cite things like
10 Webster's Dictionary to define -- to define the term national
11 emergency.

12 And I think it would be just extraordinary for the
13 Court to deviate from the 50 years of unbroken practice, since
14 the '70s, when these statutes were enacted, and purport to
15 define national emergency using a dictionary, when Congress did
16 not provide any definition of it at all.

17 It would necessarily require the Court to make its own
18 policy judgments about immigration policy and the border and
19 all of these issues that the President considered in issuing
20 his Proclamation. And that's just an area that's reserved to
21 the political branches.

22 As the District Court in Washington, D.C., where I'm
23 from, explained, quote, deciding how best to enforce existing
24 immigration laws and policies and how to keep out illegal
25 immigrants requires making policy judgments that are suited for

1 non-judicial discretion; and, thus, should not be made by the
2 judiciary, end quote.

3 That's a case called *Sadowski v. Bush*, 293 F. Supp. 2d
4 15, and I quoted from page 19 of the Court's decision.

5 So for that reason alone, I don't think the Court
6 has -- should or could pass on the merits of the President's
7 Proclamation itself.

8 For another reason, though, I don't think it can,
9 which is that Congress precluded judicial review of emergency
10 declarations. So these are very similar considerations to
11 those that make it a non-justiciable political question, also
12 made clear that Congress has precluded judicial review here.

13 So the seminal decision on this point is a case called
14 *Block v. Community Nutrition Institute*, which is a 1984 Supreme
15 Court opinion, 467 U.S. 340. And there, the Court explained
16 that determining whether a statute precludes judicial review
17 requires examining its, quote, express language, end quote, as
18 well as the, quote, structure of the statutory scheme, its
19 objectives, its legislative history, and the nature of the
20 administrative action involved.

21 And the Court further explained that the need to --
22 the desire by Congress to preclude judicial review need only
23 be, quote, fairly discernable. That's from pages 350 to -51 of
24 the Court's opinion.

25 Here, the National Emergencies Act includes no

1 substantive constraints at all on the President's authority to
2 declare a national emergency. It only imposes procedural and
3 reporting guidelines that when the President invokes other
4 authorities that the Proclamation unlocks, like 2808, which
5 I'll come back to in a second.

6 Upon declaring an emergency, the President must notify
7 Congress of the statutory authorities he will invoke, and he
8 must provide information about how those authorities are being
9 utilized. That's at 50 U.S.C. 1631 and 1641.

10 The NEA then goes on -- the National Emergency Act
11 then goes on to make clear that it's Congress, not litigation,
12 that's going to police the President's declaration of national
13 emergencies through the political process. And Congress, in
14 the National Emergencies Act, actually created a whole,
15 elaborate, congressional remedial scheme to regulate the
16 President's declaration of national emergencies.

17 That -- the addition of that complex remedial scheme,
18 without providing any private right of action for private
19 litigants, makes clear that Congress had reserved to itself, to
20 the other political branch, the authority to police the
21 President's declaration of national emergencies.

22 And just to quickly walk through what those -- what
23 Congress has done, they gave itself the authority to terminate
24 a national emergency by, quote, enacting into law a joint
25 resolution terminating the emergency, end quote. That's at 50

1 U.S.C. 1622(a)(1).

2 The National Emergencies Act requires Congress to vote
3 on whether to terminate the declared emergency within
4 six months of the declaration, and it establishes expedited
5 procedures for Congress to vote on a termination resolution.
6 That's at 1622(b) and 1622(c).

7 And indeed, that happened here. So majorities of both
8 houses of Congress attempted to terminate the President's
9 national emergency declaration by passing a joint resolution.
10 It was given expedited treatment in the committees, which is
11 something that normally does not happen. Normally a
12 legislation can sit in committee for a long time, if not
13 forever.

14 In this case, it moved through quickly on the
15 expedited process. It went straight to the floor, which is
16 something that normally is the prerogative of the Speaker of
17 the House or the Senate Majority Leader. But in this case it
18 went straight to the floor, it was voted on, but there weren't
19 enough votes to overcome a presidential veto, and so it failed.

20 Congress could have added a private enforcement
21 mechanism if it had wanted to, but it did not. And so I think
22 the Court has to defer to that and recognize that Congress just
23 simply has not provided a role for private litigants or court
24 actions in policing these sorts of declarations.

25 To give Your Honor just one analogous circumstance,

1 there's a D.C. circuit case called *Armstrong v. Bush*, which is
2 at 924 F.2d 282. It's a 1991 case we cite in our papers.

3 In that case, they held that the Presidential Records
4 Act, which is the act that sort of lays out how records at the
5 White House -- how presidential documents are meant to be
6 preserved, quote, impliedly precludes judicial review, end
7 quote, and it explained at pages 290 to -91 that it is, quote,
8 difficult to conclude that Congress intended to allow courts,
9 at the behest of private citizens, to rule on the adequacy of
10 the President's records management practices.

11 And so I think a similar principle applies here, where
12 we're talking about the President's declaration of a national
13 emergency, which is something that Congress reserved to itself
14 the authority to review.

15 One other reason -- or another reason to sort of read
16 the statute that way is that it's a well-established principle
17 that exercises the presidential discretion. The President
18 himself's discretionary judgments are not reviewable.

19 So the Supreme Court held, in a case called *Dalton v.*
20 *Specter*, which is at 511 U.S. 462, that when the Courts are
21 confronted with the claim alleging that the President has,
22 quote, violated the terms, end quote, of a statute, quote,
23 longstanding authority holds that such review is not available
24 when the statute in question commits the decision to the
25 discretion of the President. And that's at page 474 of the

1 Supreme Court's opinion.

2 Plaintiffs -- and I'm continuing to quote from the
3 opinion -- Plaintiffs' argument, quote, concerns not a want of
4 presidential power, but a mere excess or abuse of discretion in
5 exerting a power given, end quote. The Court describes such
6 claims as being simply, quote, beyond the reach of judicial
7 power, end quote.

8 In short, as the Court put it at page 476, quote, how
9 the President chooses to exercise the discretion Congress has
10 granted him is not a matter for judicial review. I inserted
11 "judicial." I think it just says "review," but you understand.
12 Page 476 of the Court's opinion.

13 So for that reason, Plaintiffs' authorities about the
14 presumption of reviewability simply don't apply. Those are
15 cases about reviewing agency decisions under the APA.

16 Here, the Plaintiffs want the Court to review directly
17 the President himself's exercise of discretion under the
18 National Emergencies Act. That's something that the Court just
19 cannot do.

20 Should the Court disagree, though, and choose to
21 consider any of this on the merits, the first challenge that
22 would be presented would be the non-delegation challenge. So
23 Plaintiffs argue that the National Emergencies Act violates the
24 non-delegation doctrine, a doctrine that the Supreme Court has
25 not used to invalidate a law since 1935, when it actually did

1 it twice, but both in 1935. So there's been quite a bit of
2 time since then.

3 The Supreme Court has long held that Congress may delegate
4 its lawmaking authority to another branch of Government as long
5 as it provides a, quote, intelligible principle to which the
6 person or body authorized to act is directed to conform.

7 That's from a very old Supreme Court case, 1928 *J.W. Hampton v. United States*.

9 The Supreme Court later explained in *Mistretta v. United States* that Congress need only, quote, clearly delineate the
10 general policy, the public agency which is to apply it, and the
11 boundaries of this delegated authority, end quote.

13 Now the NEA, I think it's important to understand, doesn't
14 actually grant any powers on its own. So the declaration of a
15 national emergency does not have any self-executing effect.
16 It's simply a procedural statute, and it requires that the
17 President further, quote, specify the provisions of law under
18 which he proposes that he or other officers will act. So if
19 you look -- and that's from 50 U.S.C. 1631.

20 So if you look at the report of the committee on
21 Government Operations National Emergencies Act, which was a
22 Senate report, Senate Report Number 1168 issued in 1976. What
23 the Senate explained at the time is that the Act does not,
24 quote, enlarge or add to executive power. It was, rather,
25 quote, an effort by the Congress to establish clear procedures

1 and safeguard -- safeguards through the exercise by the
2 President of emergency powers conferred by him -- upon him by
3 other statutes.

4 So the point of this is, the National Emergencies Act
5 doesn't expand presidential power at all. In other words, it
6 doesn't delegate any authority. If it doesn't delegate any
7 authority, then it doesn't delegate -- by definition, does not
8 delegate legislative power which, in turn, means that, by
9 definition, it cannot violate the non-delegation doctrine.

10 The only way the doctrine applies is if there's a
11 conferral of legislative power on the Executive Branch. But if
12 this statute doesn't confer any power on its own, then there's
13 no way the doctrine could apply at the beginning.

14 And so I think that just makes very clear that this
15 doesn't apply here.

16 But even if the Court's not sure about that, then I think
17 the other dispositive answer is that the other statutes, the
18 ones that the National Emergency declaration unlocks, do
19 specify even more intelligible principles than the National
20 Emergency Act itself.

21 So 10 U.S.C 2808 plainly contains intelligible standards
22 that cabin DOJ -- DOD's discretion -- sorry, the Defense
23 Department's discretion, because the Defense Department uses
24 its 2808 authority after the President has declared a national
25 emergency declaration.

1 In that case, the construction must be, quote, military
2 construction and it must be, quote, necessary to support such
3 use of the armed forces.

4 And so one of the points that the Plaintiffs make is that,
5 you know, this is a conferral of legislative power because it
6 involves moving appropriated funds.

7 But all of the money moving, all the transferring of
8 funds, is done pursuant to separate statutory authorizations,
9 separate from the National Emergencies Act.

10 So 2808 authorizes DOD to move money, and that's something
11 that is external to the President's Proclamation. That's also,
12 by the way, beyond commonplace. Congress routinely gives
13 agencies authority to move money around as the agencies
14 require, and sometimes even creates discretionary accounts
15 where the agencies can spend the money as they see fit.
16 There's nothing wrong with that. There's nothing extraordinary
17 about that.

18 The Plaintiffs also invoke the canon of constitutional
19 avoidance and say that you should interpret the National
20 Emergencies Act narrowly, to avoid the constitutional problems.
21 But as I've explained, there's no constitutional problems at
22 all; moreover, whereas here, there's no ambiguity in the
23 statute, quote, the canon of constitutional avoidance has no
24 role to play. That's at *Barter v. Showers* 574 U.S. 40,
25 page 50.

1 In all events, even if Your Honor is not sure about all
2 that, the President himself should be dismissed from the
3 lawsuit, because Plaintiffs do not have a cause of action to
4 sue the President.

5 To go back to *Dalton v. Specter*, the case I quoted -- the
6 Supreme Court case I quoted a little while ago, quote, the
7 actions of the President are not reviewable under the APA
8 because the President is not an agency. There's some ellipsis
9 in that quote, but that's one line from that opinion at
10 page 479.

11 Similarly, the Court has explained that while there may be
12 equitable actions to enjoin unlawful executive action, they
13 have to be things that traditionally existed in courts of
14 equity. That's from the *Grupo Mexicano* decision, 527 U.S. 308.
15 There's no traditional -- tradition of equitable relief against
16 the President, and so the President must be dismissed.

17 So for all those reasons, the Plaintiffs do not have
18 standing and their challenge to the National Emergency
19 Proclamation is not justiciable regardless.

20 On the other issues, the 284 construction, the 8005
21 monetary transfer within DOD, the Supreme Court has already
22 stayed an injunction from the Northern District of California
23 against the Defense Department's construction of border
24 barriers using those authorities; moreover, the State of
25 New Mexico, is actually a plaintiff in the suit in California

1 that's on appeal in the Ninth Circuit. So the State of
2 New Mexico is currently vigorously challenging the construction
3 in the two counties in New Mexico that we've talked about
4 earlier in the Ninth Circuit appeal. So that -- that issue
5 is -- that battle has been joined in the Ninth Circuit and will
6 -- may very well make its way to the Supreme Court given that
7 they've issued the stay.

8 So particularly given the Supreme Court's intervention and
9 the fact that the State of New Mexico is already vigorously
10 contesting that construction in the Ninth Circuit, as well as
11 for the reasons in our briefs, we think the Court should grant
12 summary judgment to the United States on those issues too.

13 The Plaintiffs also raise in their complaint a challenge
14 to the use of treasury forfeiture fund money to build border
15 barriers. They have not pressed that in their summary judgment
16 papers. The Court should enter summary judgment for the
17 United States on that basis as well, because the use of that
18 money is perfectly lawful.

19 There's just one more point I'd like to make. And then
20 again, I'm happy to answer any questions Your Honor may have on
21 the balance of the equities.

22 So in order to issue the injunction the Plaintiffs want,
23 the Court would need to find that the equities favor the
24 Plaintiffs. And so on that point, I think a 2008 Supreme Court
25 decision called *Winter v. NRDC*, which is at 555 U.S. 7 is very

1 instructive.

2 In that case, the Plaintiffs were environmental groups and
3 individuals who enjoyed whale watching. And the issue -- I
4 mean, essentially.

5 And the issue in the case was the Navy's testing of sonar
6 out in the ocean, which the Plaintiffs said would have an
7 adverse effect on the marine population which they said would,
8 in turn, harm their interest in, you know, whale watching and
9 the like.

10 And the Court said, you know, even if that's true, the
11 balance here is so heavily in favor of the Navy because of the
12 need to maintain, you know, war readiness and all of that, that
13 there's just -- you just can't issue an injunction for the
14 Plaintiffs with that sort of a balance.

15 Well, I think we have the same thing here. So for the
16 reasons we've discussed, the harms that the Plaintiffs have
17 advanced aren't enough for standing for all the reasons I've
18 mentioned. But even if they barely cross the standing
19 threshold, there's simply not -- you know when they're weighed
20 against the harm to the United States from enjoining the
21 Proclamation or enjoining the 284 construction, that is
22 replace- -- forbidding the Government from replacing vehicle
23 barriers with pedestrian barriers, in places where drugs are
24 being smuggled in drug smuggling corridors and all of that, the
25 balance just weighs very heavily in favor of the Government.

1 And so one other point on that. *Winter* was actually a
2 preliminary injunction case, but the Court explained, quote, it
3 would be an abuse of discretion to enter a permanent injunction
4 after final decision on the merits along the same lines as the
5 preliminary injunction here. And that's at page 32 of the
6 Court's opinion.

7 And that's because as the Court explained, quote, in each
8 case, Courts must balance the competing claims of injury and
9 must consider the effect on each party of the granting or
10 withholding of the requested relief. That's at page 24 of the
11 Court's opinion.

12 Given that Plaintiffs don't have standing, or if they do
13 have standing, the Court's order would just -- would barely
14 redress the injuries that they're talking about. I think here
15 the balance weighs heavily in favor of the Government, and that
16 is another reason to deny at least injunctive relief in this
17 case.

18 So unless the Court has any questions, I'm happy to yield.
19 Thank you.

20 MR. McDOWELL: Thank you, Your Honor. Ephraim
21 McDowell on behalf of Plaintiffs El Paso County and the Border
22 Network for Human Rights. I'll be discussing the merits of the
23 Plaintiffs' claims in this case.

24 After failing to persuade Congress to fund a border
25 wall, the President used an emergency declaration to circumvent

1 a legislative judgment that he didn't like. Since that
2 declaration, the Defendants here have proceeded toward building
3 a border wall relying on long-dormant statutory provisions as a
4 newfound source of \$6 billion.

5 Before delving into the details of our case, I think
6 it might be helpful to quickly outline our claims, how we'd ask
7 Your Honor to resolve those claims, and the remedy that we're
8 seeking for each of them.

9 Our first claim is that the President's Emergency
10 Declaration violates the National Emergencies Act based on that
11 statute's text and history. For that claim, we're seeking a
12 declaratory judgment holding that emergency declaration
13 unlawful and an injunction against DOD from taking any steps
14 toward implementing that emergency declaration.

15 That injunction against DOD would bar DOD from
16 spending any Section 2808 funds on a border wall, because the
17 Section 2808 funds become available to DOD only upon a valid
18 emergency declaration. So if we're correct that the
19 declaration is invalid, those Section 2808 funds cannot be
20 spent.

21 Our second claim is an appropriation's clause claim,
22 which is separate and independent from our National Emergencies
23 Act claim. There, we're arguing that the Defendants have
24 violated the Appropriations Clause by attempting to spend funds
25 without affirmative congressional authorization.

1 And the simplest way to resolve that claim is to hold
2 that the Consolidated Appropriations Act, and specifically
3 Section 739 of that Act, which we quote on page 34 of our
4 opening brief, does not authorize any border wall spending
5 beyond the \$1.3 billion that were allocated in the CAA itself.

6 And for that claim we're seeking an injunction against
7 both DOD and DHS from spending any funds on the border wall
8 beyond the 1.3 billion that was allocated in the CAA. And that
9 injunction would, of course, apply to both the use of
10 Section 2808 and Section 284.

11 Unless there are questions about that broad overview
12 of the case, I can move into the specifics of our claims, and I
13 would like to begin with our NEA claim.

14 In our view of the NEA, a valid emergency declaration
15 must address an unforeseen circumstance that Congress did not
16 have time to address or consider itself.

17 And the corollary of that rule is that an emergency
18 declaration has to be invalid where it addresses the exact same
19 problem that Congress considered and rejected. And we derive
20 our understanding of the NEA from both the text and the history
21 of the statute.

22 First, the text uses the term "emergency." And the
23 ordinary meaning dictionary definition and common judicial
24 interpretation of the word "emergency" is an unforeseen
25 circumstance requiring immediate action.

1 Second, the NEA's history shows that Congress was
2 trying to contract, not expand, the President's emergency
3 powers through the NEA. Prior to the NEA, presidents had total
4 discretion to declare emergencies whenever they wanted and had
5 exercised that discretion numerous times over the preceding
6 decades.

7 And through the NEA, Congress terminated the existing
8 emergencies that were then on the books and sought to ensure
9 that going forward, as the Senate report makes very clear,
10 presidents would declare emergencies only when they, quote,
11 actually exist.

12 And my friend on the other side mentioned that this is
13 solely a procedural constraint, but it's clearly not. Because
14 what the Senate report talks about is constraining presidential
15 discretion to instances where emergencies actually exist.

16 And then-Assistant Attorney General Antonin Scalia,
17 when testifying in support of the NEA, specifically warned
18 Congress that presidents should not be allowed to slap the
19 label "emergency" on things that don't merit it. That's all
20 going to substantive constraints on the President's power to
21 declare emergencies in the first place, not simply creating
22 reporting requirements and other procedural requirements on
23 presidential authority.

24 Now, applying our test to the facts of this case is
25 quite straightforward. The Proclamation admits that the

1 problem at issue here that led to the declaration of a national
2 emergency is the problem of unlawful immigration across the
3 southern border.

4 But the problem of unlawful immigration is not an
5 unforeseen circumstance that Congress didn't have time to
6 address. Indeed, the Proclamation's text itself says that the
7 problem is, quote, longstanding. And it's the problem that
8 Congress had just considered and addressed in the Consolidated
9 Appropriations Act itself. That was Congress's considered
10 judgment on how to address the problem of unlawful immigration
11 across the southern border.

12 And the President signed the CAA, the Consolidated
13 Appropriations Act, on the exact same day he issued the
14 national emergency declaration. So there could have been no
15 new facts or circumstances that Congress was unable to consider
16 in between those two actions.

17 The only inference from that sequence of events is
18 that the President was using this emergency declaration as a
19 political tool to circumvent a legislative decision that he
20 didn't like.

21 And don't just take my word for it, take the
22 Presidents's own words. In the days leading up to the
23 Proclamation he said that an emergency declaration was, quote,
24 another way of building a wall if Congress was being
25 unreasonable.

1 And in his Rose Garden speech announcing the
2 Proclamation, he said that he didn't need to do this, but would
3 rather build a wall much faster. So the text and the context
4 of the Proclamation show that it was not being used to address
5 an unforeseen circumstance that Congress didn't have time to
6 address itself; and to the contrary, it was being used as a
7 political tool.

8 And that's the aspect of this case that the Government
9 never addresses, because it raises a very serious question of
10 the separation of powers. Because ruling for the Government in
11 this case would mean that this president and any future
12 president could simply use the NEA to get around any
13 congressional decision that he or she doesn't like, and that
14 would undermine the legislative process that the framers of the
15 Constitution designed for key policymaking initiatives in the
16 country.

17 They didn't -- they didn't design a statute --
18 Congress did not design a statute to circumvent the very
19 legislative process that the framers designed.

20 And again the Government's brief, the Government's
21 oral argument here today, never addresses that core separation
22 of powers issue.

23 The Government's view of the statute is best embodied
24 on page 20 of its opening brief. And there it says that the
25 NEA is, quote, an intentional decision to leave to the

1 President the determination about when and under what
2 circumstances to declare a national emergency.

3 But that reading fails for two separate reasons.
4 First, it's not even plausible, as a matter of text, ordinary
5 meaning, and statutory history for all of the reasons that I've
6 already given.

7 But even if it were plausible, it would have to be
8 rejected because it raises a serious constitutional question
9 under the non-delegation doctrine. The Supreme Court is
10 required to satisfy the non-delegation doctrine, an
11 intelligible principle from Congress in a statute.

12 But under the Government's very own reading of the
13 NEA, as I just quoted, there's no standard, no principle, no
14 guide whatsoever, to constrain the President's emergency
15 discretion.

16 And if that weren't enough, three additional aspects
17 of this delegation make it particularly problematic.

18 Now first, the declaration of legislative power here
19 is sweeping in scope. Contrary to the Government, there's
20 clearly a delegation of legislative power here, and here's why.

21 Simply by declaring an emergency declaration under the
22 NEA, the President unlocks automatic access to 123 separate
23 statutory authorities. 96 of those 123 separate statutes
24 contain no additional criterion whatsoever beyond the mere
25 existence of an emergency under the NEA.

1 So the Government is just incorrect to say that all of
2 those additional statutes contain intelligible principles. I
3 point Your Honor to the Brennan Center amicus brief filed in
4 our case, which establishes quite clearly that 96 of those 123
5 statutes simply just say in the event of an emergency declared
6 by the President under the NEA, the President can do X.
7 There's no further intelligible principle there. And that's
8 what makes this a significant non-delegation question.

9 And just to give you a sampling of some of those
10 separate powers, simply by declaring an emergency under the
11 NEA, the President can allow for testing of chemical weapons on
12 human subjects. He can prohibit the export of any agricultural
13 commodity. And he can suspend minimum wage requirements for
14 public contracts. He can suspend rules for radio stations.

15 Again, those are all -- those are all powers that he
16 gains access to simply by declaring an emergency under the NEA,
17 which the Government will admit they think that he can do it
18 whenever -- whenever he wants to do it.

19 And the second aspect of this delegation that's
20 particularly problematic is that it's directly to the President
21 himself, rather than to an administrative agency.

22 That's important because the President, unlike an
23 administrative agency, is not constrained by a procedural
24 restriction like the APA; and, therefore, the President can
25 wield legislative power much more efficiently and dangerously

1 than an administrative agency can.

2 And I'd like to quickly now address the Government's
3 two arguments for why our NEA claim isn't reviewable at all.

4 The first one it made today was that it presents a
5 political question. But that argument is flatly contradicted
6 by the Supreme Court's decisions in *Zivotofsky* and *Japan*
7 *Whaling*, which we discussed extensively in our reply brief.

8 Both of those cases hold that pure questions of
9 statutory interpretation do not present political questions
10 because they simply ask the Court to perform a classic judicial
11 task.

12 And here, we're simply asking Your Honor to decide a
13 pure question of statutory interpretation. We're asking you to
14 determine the meaning of the NEA based on its text and history,
15 and then apply that meaning to the text and context of the
16 Proclamation.

17 We're not asking you, contrary to the Government, to
18 decide whether the border wall is a good policy or whether
19 there's a legitimate border crisis. We're simply asking
20 Your Honor to determine what the meaning of the NEA is. And we
21 would posit that it means an unforeseen circumstance that
22 Congress didn't have time to address, and then apply that
23 meaning to the Proclamation's text which uses the word
24 "longstanding," and the context in which it arose, which
25 everyone knows it arose simply because the President wanted to

1 override a congressional decision he didn't like.

2 So that's a pure question of statutory interpretation
3 far afield from any of the cases the Government cites in its
4 brief.

5 First of all, many of those cases predate *Japan*
6 *Whaling* and *Zivotofsky*, so are irrelevant altogether, because
7 we think *Japan Whaling* and *Zivotofsky* are dispositive.

8 And to the extent some of them postdate those cases,
9 they're very different than our case, because they presented
10 very different types of challenges.

11 One example was a plaintiff asked the Court to say
12 that there was no longer an emergency in Afghanistan because
13 Afghanistan had a Democratically-elected government.

14 Here, we're not asking you to determine any sort of
15 matter of policy like that. We're simply asking you, again, to
16 determine the meaning of the statute and apply it to the text
17 and context of the Proclamation.

18 The Government's second argument for why our NEA claim
19 is unreviewable is that the NEA itself precludes judicial
20 review. But again, contrary to what the Government said,
21 there's a presumption in favor of all executive action, not
22 simply agency action under the APA.

23 We cite numerous cases in our brief that were not
24 simply APA cases. And I'll get to *Dalton* in a second, which
25 the Government raised.

1 But there's a presumption favoring judicial review of
2 executive action.

3 To overcome that presumption, the Government would
4 have to point to a clear statement in the NEA showing that
5 Congress intended to preclude judicial review of emergency
6 declaration challenges.

7 But the Government points to no provision in the NEA
8 denying judicial review of such challenges. It simply points
9 to some snippets of legislative history, but that history does
10 not speak to judicial review one way or the other. It points
11 out that Congress didn't define the term "emergency," but
12 Congress frequently fails to define key statutory terms. And
13 what courts do in that situation is they apply the term's
14 ordinary meaning, just like we're asking Your Honor to do here.
15 They don't throw up their hands and just say judicial review is
16 altogether unavailable.

17 The Government's other point was that Congress itself
18 can terminate an already existing emergency by passing a
19 veto-proof law to terminate the already existing emergency.

20 But that says nothing about whether Congress wanted
21 private litigants to sue ex-ante, to challenge the lawfulness
22 of an emergency declaration in the first place.

23 And in fact, Congress can always pass a veto-proof law
24 to override executive action.

25 So the fact that it can do so here is totally

1 immaterial and says nothing about the question of preclusion of
2 judicial review.

3 The Government did raise *Dalton v. Specter*. And that
4 case is very different than this one, because it involved the
5 statute that, as the Government itself said, committed the
6 relevant decision totally to the President's discretion. It
7 was about whether to close naval bases, and it had no standards
8 whatsoever for it with respect to the President's decision
9 there.

10 And the Court held that in the case of a statute like
11 that one, a plaintiff couldn't come in and say the President
12 has abused his discretion.

13 But here, if you agree with our view of the NEA, the
14 NEA does not commit this decision to the President's
15 discretion. It imposes constraints based on the ordinary
16 meaning of emergency, as we've said.

17 So the better analogy is the *Trump v. Hawaii* case from
18 2018 from the Supreme Court. The travel ban case, where the
19 Court reviewed an executive order for statutory compliance with
20 the Immigration and Nationalities Act, and it recognized that
21 that Act meaningfully constrained the President's discretion
22 such that a plaintiff could sue to enjoin the President's
23 executive order claiming that it violated a statute, and that's
24 exactly what we're doing here.

25 Unless Your Honor has questions about the NEA claim,

1 I'd like to talk about our Appropriations Clause claim, which
2 the Government hardly addressed on the merits and simply relied
3 on the *Sierra Club* case, which I can speak to in a moment,
4 after I kind of go through our affirmative arguments.

5 But our Appropriations Clause claim is totally
6 separate and independent from our NEA claim. So even if the
7 President's emergency declaration were lawful, the Defendants'
8 plan to build a border wall must be enjoined because it
9 violates the Appropriations Clause.

10 The Appropriations Clause bars this Executive Branch
11 from spending funds absent affirmative congressional
12 authorization. And the simplest way -- as I said at my
13 opening, the simplest way to resolve this claim is to hold,
14 quite simply, that the Consolidated Appropriations Act, and
15 specifically Section 739 of that Act, do not authorize any
16 border wall spending beyond the 1.3 billion that was authorized
17 for such spending in the CAA itself.

18 And I'd start by pointing Your Honor to Section 739 of
19 the CAA, which we quote on page 34 of our opening brief.

20 That provision says that the Executive Branch may not
21 increase funding for a project that was proposed in the
22 President's budget request beyond the amount that was allocated
23 for that project in the Consolidated Appropriations Act itself.

24 Now here, the Defendants are trying to increase
25 funding for the border wall project, which the President

1 requested in a January 6, 2019, budget request, beyond the
2 1.3 billion that was allocated for that project in the CAA.

3 What the Government is trying to do runs directly
4 counter to Section 739's terms.

5 Now the Government's only argument -- again, it didn't
6 address this argument today at the hearing. But its only
7 argument in its briefing was that this is not the same project
8 that the President proposed in his budget request, because now
9 the Department of Defense is helping DHS build the wall;
10 whereas, when the President requested the funds for the wall,
11 it was assumed that would be a DHS appropriation.

12 But whether something is a project under that word's
13 ordinary meaning does not depend on what entities or how many
14 entities help carry out that project.

15 So for example, if El Paso County were building a
16 bridge and at the beginning of the construction process it used
17 one contractor, but midway through it brought in another
18 contractor to help finish the construction process, the bridge
19 would still be the same project even though multiple entities
20 carried it out, and even though another entity was joined on
21 during the construction process.

22 And that's exactly what we have here. The border wall
23 is still the same project, under that word's ordinary meaning,
24 even though now DOD is going to assist DHS with it.

25 So this is clearly prohibited by Section 739 of the

1 CAA. And on top of that, even setting aside Section 739,
2 there's a general principle of statutory construction that
3 applies in the Appropriations Clause context that where
4 Congress -- basically, when Congress addresses an issue
5 specifically, it precludes the use of more general authorities
6 to achieve that purpose.

7 So here, where Congress specifically appropriates
8 funds for a particular purpose, it impliedly precludes the
9 executive branch from going out and relying on more general
10 statutory authorities to achieve that same basic purpose.

11 And in this case what Congress did was, it
12 appropriated 1.3 billion for targeted fencing in the Rio Grande
13 Valley. That's a specific purpose. And in so doing, it
14 implicitly precluded the Executive Branch from going out and
15 relying on more general statutory authorities, like
16 Sections 2808 and 284, from achieving that same basic purpose
17 of building a border wall elsewhere.

18 So even if it weren't for Section 739, the Defendants'
19 wall funding plan would be precluded based on the specific
20 versus general principle.

21 The last thing I'd say about the CAA is this.

22 Under the Government's view of the CAA, the whole
23 protracted debate between Congress and the President about
24 whether to fund a wall, that led to the longest shutdown in
25 Government history, was all just a charade because the

1 President had the statutory authority lurking in the U.S. Code
2 to build a \$6 billion wall the entire time.

3 But under our view of the CAA, the statute actually
4 means something. It means that Congress reached a considered
5 judgment, as we all know it did, not to pass \$6 billion worth
6 of funding for a border wall. And I would urge Your Honor to
7 respect that considered judgment here.

8 I'd like to quickly address the *Sierra Club* case
9 which, as the Government mentioned, was the case that rose up
10 to the Supreme Court and the Court stayed -- stayed an
11 injunction granted by the Ninth Circuit and the District Court
12 in that case.

13 So the first point I'd make, just to be very clear,
14 the *Sierra Club* case only involved the issue of 8005
15 reprogramming. And that issue is essentially the question of
16 whether DOD can reprogram funds from its military pension
17 account to its counter-drug support account for purposes of
18 funneling that money to Section 284 to spend on a border wall.

19 That was the only issue before the Supreme Court in
20 the *Sierra Club* case, the 8005 reprogramming issue.

21 What was not before the Court in that case was the
22 National Emergencies Act. That case had nothing to do with the
23 National Emergencies Act, didn't have anything to do with
24 Section 739 of the CAA, which is our principal Appropriations
25 Clause argument here, and it didn't touch on Section 2808,

1 which is the section that governs military construction
2 projects funding, which we detail in our brief why that
3 provision does not allow expenditures of \$3.6 billion on a
4 border wall, nor did it discuss Section 284 which, again, we
5 argue in our brief doesn't allow the Government to spend
6 \$2.5 billion on a border wall.

7 So essentially four out of the five primary issues in
8 our case were not even before the Supreme Court in the *Sierra*
9 *Club* case.

10 So to the extent the Supreme Court case is relevant at
11 all, it would be to the 8005 issue. But even as to that issue,
12 the case is different. And here's the primary reason why that
13 is.

14 It's because the plaintiffs in the *Sierra Club* case
15 did not include an APA claim in their Complaint; whereas, we
16 have included an APA claim in our Complaint. And the reason
17 why that's important is because what the Supreme Court could
18 have been thinking -- and again, its order did not say very
19 much, so it's hard to know exactly what it was thinking.

20 But what it could have been thinking was this 8005
21 issue could only be raised pursuant to an APA cause of action.

22 If that was the case, then obviously it would grant
23 the stay in the *Sierra Club* case, because they didn't even have
24 an APA claim. But we do have an APA claim. So the primary
25 reason that that's likely what the Supreme Court was relying on

1 doesn't even apply in our case.

2 The other possible reason that the Supreme Court could
3 have been relying on was the zone-of-interests test. And the
4 Government talks a lot about the zone-of-interests test in its
5 briefing. It didn't mention it here today.

6 Again, the initial point I would make about the
7 zone-of-interests test -- and we didn't get a chance to say
8 this in our brief, because we didn't get a fifth brief.

9 But the Government doesn't even argue that we don't
10 fall within the zone of interests of the Consolidated
11 Appropriations Act. It only says we don't fall within the zone
12 of interests of 2808, 284, or 8005.

13 So it's forfeited the argument that we don't fall
14 within the zone of interests of the CAA which, again, is our
15 principal Appropriations Clause argument.

16 But even setting that aside, we have a stronger case
17 that we fall within the zone of interests of these funding
18 statutes than the *Sierra Club* plaintiffs do.

19 So these funding statutes that are at issue invo- --
20 they touch on military construction funds and counter-drug
21 support funds.

22 El Paso County's core harms here come from being
23 branded a military construction zone and a drug trafficking
24 corridor. So those harms are very much within the broad zone
25 of interests of the funding statutes that are involved in this

1 case.

2 And as the Supreme Court and the Fifth Circuit have
3 said many times, the zone-of-interests test is an extremely
4 broad test, and a plaintiff only needs to arguably fall within
5 the zone of interests. The zone-of-interests test is not meant
6 to thwart the general presumption of judicial review of agency
7 action, nor does the plaintiff have to show that a statute was
8 intended to benefit him. All the plaintiff has to show is he's
9 generally within the zone of interests of these statutes.

10 And here, if the correct inquiry, which the Government
11 thinks it is, is to look at the zone of interests of 2808, 284,
12 and 8005, we fall within the zone of interests of those
13 military construction funding and counter-drug support funding
14 statutes.

15 The other -- the last point I'd like to make,
16 Your Honor, is as to the Section 2808 funds. So that's the
17 source of funding that the Government is going to use to spend
18 \$3.6 billion on a border wall.

19 The Government said here today that there's going to
20 be a decision on what specific projects to use those 2808 funds
21 for very soon. And in so doing, it essentially admitted that
22 there's a substantial risk of using those funds.

23 So that's very important, not only for purposes of
24 Article III standing, which my colleague addressed it --
25 addressed, but also for purposes of final agency action.

1 Because it's very clear that there has been a final
2 determination made to spend Section 2808 funds on the wall
3 along the southwest border.

4 All they haven't determined is what specific projects
5 they're going to use those funds for. But that's immaterial
6 for purposes of our challenge, because our challenge is a very
7 broad one. It's a challenge to their authority to use
8 Section 2808 funds on a border wall anywhere along the
9 southwest border.

10 So it doesn't depend in any way on what specific
11 projects or sectors are at issue. So whether or not the
12 Government has identified those specific projects, whether or
13 not it's not going to do so imminently, as counsel suggested
14 today, there's still final agency action at this point, and we
15 urge Your Honor to address the 2808 claim on the merits.

16 And to the extent Your Honor gets into the text of
17 2808 at all, it would only be because you disagree with us on
18 the NEA claim. Because again, if we are correct about the NEA
19 claim, the 2808 funds have to be enjoined and you disagree with
20 us about the Consolidated Appropriations Act claim under the
21 Appropriations Clause. Because if you agree with us on that,
22 the whole wall funding plan has to be enjoined.

23 So even if you were to disagree with us about -- with
24 us on two things, the text of Section 2808 does not allow
25 border wall expenditures at all. That's because 2808 only

1 talks about military construction projects. And to be a
2 military construction project under that term's statutory
3 definition, the project must be carried out, quote, with
4 respect to a military installation. And then "military
5 installation" is defined as, quote, base, camp, post, station,
6 yard, center, or other activity under the jurisdiction of the
7 secretary of a military department.

8 So here, the border wall is going to be carried out
9 with respect to the southern border. The southern border is
10 not a military installation. It's not a base, camp, post,
11 station, yard, center, or other activity. And even if it were,
12 it's not under the jurisdiction of the secretary of a military
13 department. If anything, the border is under DHS's
14 jurisdiction. And DHS is a civilian agency, not a military
15 department.

16 And indeed, on page 25 of the Government's final reply
17 brief, the Government admits that the border wall is not a
18 military construction project for purposes of Section 8005.
19 That, again, is the section that the Government is using to
20 reprogram funds from one account to another within DOD.

21 So it admits, for purposes of Section 8005, that it's
22 not a military construction project, as it has to, because
23 Section 8005 expressly bars reprogramming for military
24 construction projects. But at the same time, the Government is
25 here arguing that a border wall is a military construction

1 project for purposes of 2808.

2 Now, not only is that arbitrary and capricious agency
3 reasoning that would have to be set aside under the APA,
4 because, clearly, an agency can't give the same statutory term
5 two definitions purely out of convenience. But it's especially
6 arbitrary in this case, because "military construction
7 project," as I've noted, is a statutorily defined term.

8 So the Government is giving a statutorily defined term
9 two different -- other -- two different other meanings that
10 aren't the statutorily defined definition for purposes of two
11 different actions, again, purely out of convenience.

12 And the last thing I'd say about 2808 is, I think it's
13 helpful to think about the past two uses of this statute. It's
14 only been used twice in history.

15 Once was in the wake of Operation Desert Shield, and
16 the other was in the wake of 9/11. Both of those were clearly
17 military-related emergencies, and the statute was being used to
18 fund military construction projects, meaning ordinary military
19 facilities on military sites, things like army barracks on a
20 base in Afghanistan.

21 Now, here, the Government is trying to use 2808 in
22 response to a non-military emergency, a civilian issue about
23 unlawful immigration, to build a non-military project, a border
24 wall, off of a military site. So the mere novelty of this
25 interpretation of Section 2808 is yet another reason to reject

1 it.

2 Now just to sum up and to conclude here, Your Honor.

3 THE COURT: You have two minutes.

4 MR. McDOWELL: Okay. The first thing, again to sum
5 up, if the emergency declaration violates the NEA, we'd ask for
6 a declaratory judgment and an injunction against DOD.

7 And then if the wall funding plan -- if we're correct
8 that the wall funding plan violates the Appropriations Clause,
9 we'd ask for an injunction against both DOD and DHS.

10 But to close, I'd like to reiterate the extraordinary
11 consequences that would flow from ruling for the Government in
12 this case. Such a ruling would give this President and any
13 future president unfettered authority to use an emergency
14 declaration to circumvent the legislative process that the
15 framers of the Constitution envisioned. And it would give the
16 Executive Branch unfettered power to manipulate and spend funds
17 in ways that Congress never intended, even though the
18 Constitution designates Congress with the exclusive power of
19 the purse.

20 So protecting the separation of powers require
21 rejecting the Government's unlawful actions in this case and
22 granting the Plaintiffs' summary judgment and a permanent
23 injunction.

24 Thank you.

25 THE COURT: You have not addressed the forfeiture

1 funds, the Treasury forfeiture funds. Have you abandoned that?

2 MR. McDOWELL: That's correct. Yes.

3 THE COURT: Okay. Very well. I'll take it under
4 advisement.

5 You-all may be excused. We'll be in recess.

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15 CERTIFICATION

16

17 I certify that the foregoing is a correct transcript from
18 the record of proceedings in the above-entitled matter. I
19 further certify that the transcript fees and format comply with
20 those prescribed by the Court and the Judicial Conference of
21 the United States.

22

23 Date: September 6, 2019

24 /s/ Maria del Socorro Briggs

25 Maria del Socorro Briggs

